No. 10030

In the United States
Circuit Court of Appeals
For the Ninth Circuit

In the Matter of WEST HILLS MEMORIAL PARK, a corporation, Bankrupt, WM. H. B. SMITH, JR., H. J. SANDBERG, HOWARD-COOPER CORPORATION, SHELL OIL COMPANY, JAMES A. SEWELL, DRAKE LUMBER COMPANY, C. H. MARTIN, GEORGE TEUFEL, HOWARD E. GOLDEN, P. E. GOLDEN, L. L. DOUGAN, WARREN H. COOLEY, OREGON SECURITIES COMPANY, CUTLER PRINTING COMPANY and OREGON SIGN & NEON CORPORATION,
Appellants,

vs.

CLARENCE X. BOLLENBACH, Trustee of the Estate of West Hills Memorial Park, a corporation, Bankrupt, *Appellee.*

APPELLANTS' REPLY BRIEF

Upon Appeal from the District Court of the United States for the District of Oregon.

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APPELLANTS' REPLY BRIEF

Upon Appeal from the District Court of the United States for the District of Oregon.

We shall first analyze the points and authorities cited by appellee.

POINT A ON PAGE 5 OF APPELLEE'S BRIEF STATES THAT

Claims for legal services rendered to the bankrupt, if otherwise valid, are provable and allowable in bankruptcy. Two cases and a citation from Remington are cited as authorities. With that point we have no quarrel. Neither the textbook citation nor the cases state or infer that claims of attorneys for services rendered the bankrupt may be voted in the selection of a trustee. The case of Beale vs. Snead, cited on page 7 of appellants' brief, is direct authority for the proposition that a claim for services rendered the bankrupt as attorney should be excluded from voting in the election of the trustee. That case was decided in 1936 by the Circuit Court of Appeals for the 4th Circuit and was affirmed by the Supreme Court. The Circuit Court of Appeals said on page 970 in 81 Fed. (2d) as follows:

> "As Mr. Catterall's claim was for services rendered the bankrupt as attorney, it was properly excluded from voting in the election of the trustee."

Based upon the law so clearly stated the referee should not have permitted the Kavanaugh claim to be voted. However, appellants made the further objection to the claim that the consideration should have been set forth in detail in the proof of claim and for want thereof the proof was insufficient for any purpose. That leads to a discussion of appellee's authorities.

POINT B ON PAGE 5 OF HIS BRIEF

That point is that a proof of claim duly verified asserting a claim valid on its face is prima facie evidence of its provability and allowability. It is true that a proof of claim, complete on its face and duly verified is prima facie evidence of the facts set forth therein. The rule is stated as follows in

6 Am. Jur. 567:

> "Care and particularity are required in the preparation of a proof of claim, for it is both the creditor's pleading and his evidence and makes for him a prima facie case."

This is the rule as laid down in Remington, Collier and numerous authorities cited on page 7 of appellants' brief. We reassert that to be the rule. But none of the citations of appellee under that point (page 5 of appellee's brief) state that where the proof of claim fails to state the facts required as evidence, it could still make a prima facie case. It is because the proof of claim serves the purpose of a deposition and has probative effect that a general statement of the consideration is insufficient to permit the claim to be allowed. Only when the proof of claim does contain the necessary and required statement of facts can it serve as evidence. Then and then only does it make a prima facie case and no authorities have been cited by appellees holding otherwise.

In all of the cases cited by appellee under Point B the proofs of claim were sufficient. Even the last of those cases did state to a reasonable extent what

the consideration and basis were for the claim. That is In re Hannevig, 10 Fed. (2d) 941, from which we quote as follows:

Quoting from page 941:

"The claim involved is in the sum of $320,364.80, which is alleged to be due from the bankrupt on unpaid subscriptions on account of the purchase of shares of stock in Hannevig's Bank, Limited, afterwards known as British-American & Continental Bank, Limited. The claim is filed by the official liquidator of the bank, which is in liquidation. It is alleged that the bank allotted to the bankrupt 20,000 shares of 5 pounds each, and that $320,364.80 is due thereon."

UNDER POINT C ON PAGE 6

Appellee in his brief makes a point that where a claimant is present at the meeting to elect a trustee and prepared to support the claim it is not error for the referee to allow it for voting purposes. Three cases are cited to support this point. The first is the case of In re Louis Elting, Inc., 4 F. Sup. 732.

In that case the proof of claim did not contain a detailed statement of the merchandise sold and delivered by the creditor. The District Court for the Southern District of New York held as follows:

"In proceedings for election of a trustee in bankruptcy, proof of claim, although not setting forth character of merchandise sold and delivered, was sufficient where the creditor *was present and supplied necessary information and tendered himself for further cross-examination if desired.*"

This is different than the stated point, i. e., that a claimant need but be present and prepared to support the claim. We shall come back to that case again later.

The second case cited under Point C is Baumbauer vs. Austin, 186 F. 260. Perusal of that case will disclose that the proof of claim contained a detailed statement of the basis of the claim. It was sufficient for the claimant to present it and rest. This made a prima facie case and there was insufficient opposing testimony to overcome that case. There is nothing in that decision to modify the rule that the proof of claim must set forth the consideration to be allowable.

The third case cited under Point C is Steinmetz vs. Grennon, 106 Ore. 625, 212 Pac. 532. This was an action by one partner against another wherein the parties had sold a partnership business and, after going over their accounts, agreed upon the balance due from one to the other. The court says also that where the parties agree on the balance, the law will imply a promise to pay. This case has no application to the instant situation as will be shown later herein in greater detail.

UNDER POINT D ON PAGE 6

Two cases are cited. These cases hold that great weight will be given findings of fact of a referee. We do not quarrel with the holding in those cases.

But here the referee did not have a hearing or make any findings. He merely held as a matter of law that the proof of claim was sufficient. We shall go into this also in greater detail shortly.

UNDER POINT E ON PAGE 7

are two citations, one in Remington and the other a U. S. Supreme Court case. These hold that the title to property in the bankruptcy estate is set as of the date of the filing of the petition. This is good policy and we concur in that. It does not control as to proofs of claim and we confess that there are no authorities either way on the effect of executing a proof of claim and power of attorney before adjudication. The question therefore is purely one of policy. We feel that no good purpose can be served by allowing such claims until amended. Ultimately, for dividend purposes the claimant can either file a new proof or amend and thereby participate. No hardship will therefore result from adopting the policy for which we contend.

On the other hand, in involuntary cases considerable time often elapses between the filing of the petition and ultimate adjudication. If proofs of claim can be properly executed before adjudication ready opportunity is afforded someone to obtain claims in the interest of the bankrupt while the petitoning creditors are engaged in obtaining the involuntary adjudication. It can be said that if such

is the fact the claims will be denied the right to vote anyhow. It is important to prevent wrongful acts by adopting proper policy, and such procedure is better than saying "We'll catch the culprit anyhow." Too often the direct connection with the bankrupt is difficult or impossible to prove. Why give the bankrupt such opportunity, especially when he deems that the adjudication is probable? The bankrupt knows who and where his creditors are long before the petitioning creditors learn of them. He can build his fences while the petitioning creditors are laboring to prove the grounds for involuntary adjudication. It should not be overlooked that the officers and attorneys for the bankrupt voted or attempted to vote for the same candidate who was nominated by the creditors whose proofs were executed prior to adjudication. Nor is there merit to the statement that at the time those proofs were executed all that needed to be done was enter the formal order of adjudication. There was then pending a motion to dismiss the petition notwithstanding the adjudication. Moreover, the verdict of the jury covered merely the question of insolvency and commission of the act of bankruptcy. All other issues were for the Court to decide. (See Section 19(a) of the Bankruptcy Act.) To the writer of this brief presentation of the issue on the respective motions to dismiss or to adjudicate were serious matters and not mere formalities.

ARGUMENT

Now let us meet the argument set forth in appellee's brief. Let us return to the Kavanaugh claim.

Appellants objected to the claim and the objection was overruled. The referee had two choices before him when that objection was made. He had either to postpone the meeting and election for a future date until a hearing could be had upon the claim or he had to conduct a hearing then and there and upon that hearing make a determination of the claim. In this instance the referee did neither. He *did not* postpone the meeting, he *did not* conduct a summary hearing and take evidence upon the claim. Appellants' Petition to Review states what occurred. See Transcript of Record, page 11, paragraph XII and first part of paragraph XIII, which says as follows:

> "XII.
>
> "That petitioners objected to the voting of the claim presented by R. N. Kavanaugh, among other reasons, on the ground that said claim was not properly itemized and that the consideration therefor was not sufficiently set forth."
>
> "XIII.
>
> "That said objection was overruled . . . ."

That this is what occurred is confirmed by the referee when he stated in his certificate (see page 2 of Transcript of Record) as follows:

> "The facts stated in the petition for review are substantially correct, except in the following particulars:"

Then follow five exceptions, none of which denies the statements in paragraphs XII and XIII of the Petition to Review just quoted. The referee *did not* conduct a summary hearing or take evidence upon the claim and he *did not* say he did. The referee did set forth the following in his statement of the Questions Presented. Commencing at the last paragraph on page 5 of Transcript of Record:

> "(3) Was the referee in error in permitting R. N. Kavanaugh, Administrator of the Estate of J. P. Kavanaugh, deceased, to vote the claim of the estate in the sum of $2500.00 over the objection of the petitioners that it was not properly itemized and the consideration therefor not sufficiently set forth?"
>
> "With respect to the objections to the Kavanaugh claim, Mr. Lenske admitted that he knew that Judge Kavanaugh had rendered valuable services to the bankrupt some years ago but that he was of the opinion that the amount asked was too large. Mr. Kavanaugh stated that statements had been rendered to the bankrupt for this amount over a period of years and that it had not been questioned by the bankrupt. *The referee ruled that he would give full faith and credit to the sworn statement contained in the claim and that Mr. Kavanaugh was entitled to vote the claim.*"

R. N. Kavanaugh, administrator of the estate of the estate of J. P. Kavanaugh, *did not* offer to supply the want of testimony in the proof of claim and *did not* tender himself for examination thereon as was done in the Louis Elting case, supra, and the referee *did not* say or find that R. N. Kavanaugh so did.

Appellee states on the bottom of page 10 of his brief:

> "Moreover, claimant, R. N. Kavanaugh, as administrator, was present, was subject to examination and cross-examination and under these circumstances it has been held, In re Louis Elting, Inc., 4 Fed. Sup. 732, that it would remove the objection that the claim was not itemized."

Appellee does not say that R. N. Kavanaugh was examined or cross-examined or that he supplied the necessary information and tendered himself for examination. Yet the Louis Elting case, the sole exception to the vast array of direct authority cited in appellants' brief excuses the detailed statement of the consideration only

> "where the creditor was present and supplied the necessary information and tendered himself for further cross-examination if desired."

What did R. N. Kavanaugh do or say? He merely gave an excuse for the failure to make the necessary proof. How can stating that bankrupt had not objected to statements sent to bankrupt satisfy the want of proof required by the Bankruptcy Act and the Supreme Court decisions?

The very holding in the Louis Elting case, supra, is a departure by the District Court for the Southern District of New York from the requirement of detailed statement of the consideration by the Supreme Court decisions. It should not be followed. But if it is followed this Court should not further relax the

law by holding that if an excuse for not giving the information is tendered orally instead of the information itself, then also the requirement of the Bankruptcy Act will be forgotten or overlooked.

Appellee draws the inference from the bare statement of R. N. Kavanaugh that statements had been rendered to the bankrupt for $2500.00 over a period of years and that it had not been questioned, constituted an account stated. In the first place it is not true that such statements had been rendered to bankrupt for a period of years and had not been questioned. The statement itself says the claim is for legal services rendered between May 1, 1935 and October 1, 1938. The bankrupt was in receivership before such period of time could elapse. But that is beside the point. Permit us to continue in the following manner:

1. Was the proof of claim itself based upon an account stated?
   No, see page 14 of Transcript of Record.

2. Did R. N. Kavanaugh orally or otherwise change the proof of claim from one for an account for services rendered to one on an account stated?
   No.

3. Did the referee find at the time and rule that there was an account stated or that the claim was changed to one on an account stated?
   No.

Only if the above questions could be answered in the affirmative would the legal question arise as to whether a claim on an account stated need not state the consideration. Not one such authority has been cited by appellee; whereas, amongst the authorities cited by appellants even a claim based upon a note, which in and of itself imports a valid consideration, must nevertheless set forth the consideration to effect sufficient proof. See authorities on page 7 of appellants' brief. But let us see what logic there is to such contention.

The purpose of Sec. 57(a) of the Bankruptcy Act and Supreme Court General Order XXI, as stated by the Court in the Matter of Creasinger, 17 A.B.R. 538, is "to enable the trustee or creditors to pursue any proper and legitimate inquiry as to the fairness and legality of that claim."

If the claim is filed as an ordinary account without specifying the consideration by itemizing the account, is the purpose of the act and order fulfilled by the claimant shifting to the contention at the crucial moment that the claim is based upon an account stated because the claimant did not object to the statements rendered? Does that aid creditors in ascertaining whether the claim is legitimate, either in whole or in part? Does it aid a referee in determining the validity of the claim without further inquiry and investigation? On the contrary, it merely attempts to avoid the direction of the statute, the order and the Supreme Court rulings. It in effect

says that when it's called tweedledee claimant must give forth reasonable testimony and information to persons entitled to it in writing and under oath and where it can be readily seen but if you really insist on the information, well, my name is tweedledum and I don't have to tell you.

May we quote a bit more from In the Matter of Creasinger, supra:

> "The claims are so meagre and general in their character that they must clearly be held insufficient. It is not even apparent therefrom whether the claim is upon an express contract for a specific amount of money which was agreed upon to be paid by the bankrupt to Messrs. Shinn for their services, or whether it is upon an implied contract for the reasonable value of such services."

We now come to the question of what effect shall be given to the statement of counsel for some of the objecting creditors that "he knew that Judge Kavanaugh had rendered valuable services to the bankrupt some years ago but that he was of the opinion that the amount was too large." It will be noted from the original proofs of claim on file with the clerk that said counsel was not attorney in fact for all of the claimants who voted for Herbert M. Cole; that all of the creditors who voted for him did object to the Kavanaugh claim. See paragraph XII of page 11 of Transcript of Record. The right to object to a claim is a substantial right and each creditor has that right.

Vol. 2 Remington (4th Ed.) page 609.

"The right of each creditor to have improper claims excluded from allowance and therefore from voting is a substantial right."

Surely the creditors not represented by the writer were not affected in their rights by the statement that the referee attributes to him. In any event such statement would not supply the want of sufficient evidence in the proof of claim. The sufficiency of an itemized statement has a direct bearing on the amount of the claim. And it was the duty of the referee to deny the claim regardless of who "knew that Judge Kavanaugh had rendered valuable services to the bankkrupt."

Vol. 2 Remington, 4th Ed. page 536.

"A claim may not be allowed 'provisionally' to enable a creditor to participate in creditors' meetings, but must either be allowed or disallowed absolutely."

Vol. 2 Remington, 4th Ed., Sec. 1007, page 539.

"If the claim is not 'duly proved', that is to say, if the affidavit for proof of debt be not correct in form, ... the referee should not 'allow' the claim."

"And the referee should not allow it even though no party in interest objects."

In re Goble Boat Co., 190 Fed. 92, 27 A.B.R. 48.

"A referee is not justified in allowing a claim against an estate in bankrkuptcy when the proofs do not comply with the statute or general orders promulgated by the Supreme Court,

whether creditors or the trustee raise specific objections to the sufficiency of the proof filed or not."

At the bottom of page 9 of appellee's brief we find the statement that the referee heard the objection to the Kavanaugh claim in a summary manner. Appellee makes this statement in error. Neither he nor his counsel were there. They cannot speak from personal knowledge. What about the record on that point?

1. Did the referee say or find that he conducted a summary hearing?
   No.

2. Did the referee find for the claimant on the merits?
   No.

3. What did the referee do in that respect?
   He merely overruled the objections made by appellants and did not postpone the meeting to hear the claim on its merits and he wrongfully ruled that the claim was sufficient on its face when he said: (page 6 of Transcript of record)

"The referee ruled that he would give full faith and credit to the sworn statement contained in the claim. . . ."

All proceedings in bankruptcy before a referee are in their nature summary and a hearing on a claim is a summary hearing. Ruling on the sufficiency of the proof of claim and thereupon promptly

allowing it is not conducting a summary hearing. The rule is stated in

Vol. 1 Remington, 4th Ed., page 61, Sec. 27.

> "While proceedings in bankruptcy may be summary they should not be so summary as to deprive a party of those fundamental rights and privileges that belong to every citizen, among which are the rights to be advised of the demand made upon him and, after being so advised to have a reasonable time to prepare his defense and produce his witnesses."

Vol. 1 Remington, 4th Ed., page 60, Sec. 27.

> "The bankrupt act contemplates the proceedings in bankruptcy shall progress with all reasonable dispatch *compatible with the due and orderly administration of justice and a proper regard for the fundamental rights of the citizen.*"

See also Lockman v. Lang, 132 Fed. 1, 12 A. B.R. 497.

This matter is not one of formality or informality, it is one of substance.

In the District Court's opinion we find this statement (page 19 of Transcript of Record):

> "Furthermore, the record on the trial of the insolvency petition will show that the petitioners introduced testimony as to the validity and amount of this claim in order to show insolvency. This fact does not create an estoppel, because the trustee is bound to scrutinize the claim until final liquidation if he discover facts which show improper allowance, but the Referee could consider such facts to determine whether the amount of the claim was proper for allowances."

1. Did the referee consider it?
   No.

2. Did the referee say that he considered it?
   No.

3. Did the District Judge say that the referee considered it?
   No, he merely stated that the referee *could* consider it.

The fact is that no finding or conclusion was reached by the jury on the validity or amount of the claim. The verdict was a general verdict on the interrogatories submitted and it did not depend upon the Kavanaugh claim. But here is an interesting sidelight.

If consideration should be given to the fact that R. N. Kavanaugh had testified as to the Kavanaugh claim and the referee had known about and considered that fact, what should have been his reaction? He should have held that one who had testified in behalf of a claim should certainly set forth the details showing the consideration in the proof of claim and if not, he should have offered himself for examination and tendered the missing information instead of giving an excuse for not tendering the evidentiary information.

REMINDERS

1. The referee should not appoint a trustee unless the creditors actually fail to elect one.

> In the Matter of Universal Seal Cap Company, 47 A.B.R. (N.S.) 106, D.C. E.D. of N.Y. 1941.

2. Under the authority of Beale v. Snead, supra, uncontradicted by any authority cited by appellee, the claim of an attorney for services rendered the bankrupt may not be voted for a trustee.

3. In colloquial language we can, after stating above reminders 1 and 2, say "period", but in an abundance of caution we add the following:

4. Where authorities are lacking, good policy should control and such policy should not include claims obtained before adjudication.

5. What counsel for some but not all of the objecting creditors "knew" does not affect the rights of the others.

6. What the referee *could* have considered but didn't should be ignored.

7. Several excellent authorities were cited by appellants directly on the point that proofs of claims for attorney fees *must* be itemized to be allowed and not one was cited to the contrary on such direct point.

8. Even if there were no objections to the claims that were insufficient on their face, the referee should not have allowed them.

9. The referee should in no event allow claims "for voting purposes" that should not be allowed for all purposes.

10. If the requirement of itemization of claims for legal services was carried out and as a result the Kavanaugh claim was filed for $2413.57 in lieu of the lumped$2500.00 and the claims were otherwise votable, appellants would have controlled the election by a clear majority in both number and amount.

11. This appeal is not from findings of a referee but a clear error of law gleaned from his own Certificate and the proofs of claim that accompanied it.

12. Any of the errors committed by the referee were sufficient to give appellants a clear majority in number and amount and the right of election.

Respectfully submitted,

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